United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 28, 2006

TO : James J. McDermott, Regional Director
Region 31

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Southern California Pipe Trades
District Council 16 and
Plumbers Local Union 250 584-1275-6700
(J.R. Filanc Construction) 584-2577-3300
Case 31-CE-222 584-5056

This Section 8(e) case was submitted for determining whether the self-help and the subcontracting clauses of the parties' collective-bargaining agreement are facially unlawful. We conclude that the self-help clause is not facially unlawful because, when read in conjunction with the other part of the agreement to which it refers, it is susceptible to both a lawful and unlawful interpretation. We also conclude that the subcontracting clause is not facially unlawful because the plain language of the clause conforms to the construction industry proviso's requirements.

FACTS

J.R. Filanc Construction Co. (Filanc) is a general engineering contractor that has been in business since 1952 but does not have, and has never had, a fabrication shop. It bids on work undertaken by municipalities and some private developers to construct water and waste water facilities. Filanc has been signatory to an Independent Master Labor Agreement (MLA) with Southern California Pipe Trades District Council 16 (District Council 16) for over thirty years. The term of Filanc's most recent MLA is March 24, 2003 until June 30, 2008.

In 2003, Filanc formed a joint venture with a separate company, HDR Design-Build, Inc. A four-member executive committee (two from each company) runs the joint venture's affairs. The joint venture successfully bid on a $45,000,000 contract for the West Basin Water Recycling Plant Phase IV Construction Project (project) in El Segundo, California. In submitting its bid for the project, the joint venture selected Jifco, Inc. (Jifco), a Northern California fabricator, to design and manufacture all piping systems for the project in compliance with the

contract's specifications.[1] Jifco is not signatory to the MLA.

About May 2005,[2] Jifco began delivering the piping systems that it had designed and built to the project job site via common carrier. Jifco provided all piping between 6 and 60 inches in diameter for the project. Once delivered to the project, the piping systems were installed by Filanc employees and workers dispatched to the jobsite by Plumbers Local Union 250 (Local 250).

On or about June 20, the business agent for Local 250 visited the project and asked the project manager which company was being used as the fabricator and whether it was a signatory to the MLA. The project manager told the business agent that Jifco was the fabricator and he was not sure whether it was a signatory. In July, the business agent told the project manager that he had decided to leave the deal with Jifco alone to get the job done. The project manager did not reply. In September, the business agent visited the site and told the project manager that the Iron Workers had complained about the use of non-union pipe on the project and that he felt he was under a microscope for not doing his job.

On October 11, Local 250 filed a grievance against Filanc alleging the violation of seven separate sections of the MLA. The detailed description of the grievance accused Filanc of "subcontracting pipe fabrication to a non-union fab shop." The grievance refers to the following provisions of the MLA:

Section 6.1.3, providing in pertinent part:

> The Employer agrees that all work covered in this Agreement, . . . including, but not limited to all fabrication and installation work over which the Employer has control, shall be performed by the Employer under the terms and conditions of this Agreement.

---

[1] The project specifications expressly require that some work such as pickling (acid wash), epoxy coating and welding be performed off site. Other processes, such as bending, shaping, and cutting large pipes requires machinery that would be impractical, if not impossible, to perform on site.

[2] All dates are in 2005 unless otherwise noted.

Section 6.1.4, a self-help clause, stating in pertinent part:

> In the event any fabrication and/or installation work mentioned in Paragraph 6.1.3. has been performed, is being performed, or will be performed by anyone other than employees working for Employers in accordance with the provisions of this Agreement, the Employer agrees to redo the work or pay the equivalent of wages and fringe benefits lost by employees covered by this Agreement as determined by the Joint Arbitration Board . . . . Contractors signed to this Agreement shall be bound by it on all jobs or projects in its entirely.

Section 6.1.5, a subcontractor clause, providing:

> The Contractor agrees that neither he nor any of his subcontractors on the site will subcontract any work covered by this Agreement to be done at the site of the construction, alteration, painting or repair of a building structure or other work except to a person, firm or corporation party to the District Council No. 16 Master Labor Agreement.

Appendix D.3.4, providing in pertinent part:

> The Fabrication Section 7 of this Agreement shall be amended for the purpose of this Section . . . Fabrication yard or shop shall be considered an extension of the job site for purpose of dispatch and monetary benefits.

Filanc filed the instant charge alleging that District Council 16 and Local 250 entered into an agreement violating Section 8(e) of the Act. In a related case, 31-CC-2141, the Region has authorized issuance of complaint on Filanc's charge that Local 250 violated Section 8(b)(4)(ii)(A) and (B) by filing the grievance, in that it sought to *apply* the MLA to work that had not been traditionally or historically performed by the Employer's employees. Pursuant to this determination, Local 250 sought an interpretation of the MLA that would violate Section 8(e) and would force Filanc to cease doing business with a company that was not signatory to an agreement with

Local 250.[3] The Region here seeks advice only as to the facial validity of the self-help and subcontracting clauses of the MLA.

ACTION

We conclude that the self-help clause (6.1.4) is not facially unlawful because, when read in conjunction with the other part of the MLA to which it refers, it is susceptible to both a lawful and unlawful interpretation. We also conclude that the subcontracting clause of the MLA (6.1.5) is not facially unlawful because the plain language of the clause conforms to the construction industry proviso's requirements. Accordingly, the charge should be dismissed, absent withdrawal.

The Board has developed rules of construction for interpreting clauses to determine their facial validity under Section 8(e): "[I]f the meaning of the clause is clear, the Board will determine forthwith its validity under 8(e); and where the clause is not clearly unlawful on its face, the Board will interpret it to require no more than what is allowed by law."[4] Thus, the Board will not presume illegality, but rather will find a contractual clause lawful if it is amenable to a lawful interpretation.[5]

A. The self-help clause is not facially unlawful

The Employer alleges that Section 6.1.4 of the MLA is secondary on its face because it requires that all fabrication work over which the employers have control must be performed by employees covered by the MLA. If not, it requires that the employer either redo the work or pay a penalty if such work is performed by anyone other than employees working for employers in accordance with provisions of the MLA.

---

[3] After the Region authorized complaint on the related 8(b)(4)(ii)(A) &(B) charge, Local 250 provided the Region assurances that it would hold the grievance in abeyance pending the outcome of that matter.

[4] Teamsters Local 982 (J.K. Barker Trucking Co.), 181 NLRB 515, 517 (1970), affd. 450 F.2d 1322 (D.C. Cir. 1971) (footnotes omitted).

[5] Teamsters Local 896 (Anheuser Busch, Inc.), 296 NLRB 1025, 1028 (1989). See also Bricklayers Local 18 (Willis & Son Masonry), 191 NLRB 872, 874 (1971) (contractual language not per se unlawful where it was ambiguous and could be construed lawfully).

However, although Section 6.1.4 of the MLA is secondary on its face, it is saved by its arguable work preservation objective.[6] As the parties have not negotiated a more specific definition for "all fabrication and installation work over which the employer has control" in section 6.1.3 of the collective-bargaining agreement, that provision could be read to include fabrication work not performed by the bargaining unit employees -- for example, the work on large pipes performed elsewhere by Jifco. On the other hand, section 6.1.3 is susceptible of a lawful interpretation in that the Employer historically has performed and still performs some fabrication work at its job sites, such as the fabrication of small-diameter pipes. Consequently, the provision may serve to preserve work for bargaining unit employees by prohibiting assigning out or subcontracting such work traditionally and historically performed by unit employees. Since Section 6.1.4 makes reference to Section 6.1.3, then Section 6.1.4 also is susceptible of both a lawful and an unlawful interpretation. Therefore, we conclude that the self-help provision (6.1.4) is not unlawful on its face.

B. The subcontractor clause is not facially unlawful

The Employer also argues that Section 6.1.5 violates Section 8(e) on its face because it requires non-jobsite work to be performed by union signatories. The Employer asserts that while 6.1.5 is expressly limited to jobsite work, the definition of jobsite in the MLA is broadened by Appendix D.3.4 to include fabrication shops and yards, which are not actually part of the jobsite. The Employer therefore argues that this facially secondary provision is not saved by the construction industry proviso.

Once it is determined that an employer is engaged in the construction industry for purposes of the proviso to Section 8(e),[7] the question remains whether the subcontractor clause in dispute is protected by the proviso as applying to work to be performed "at the site of the construction." It is well settled that such secondary clauses are privileged by the proviso if they are limited to work performed on the job site.[8]

---

[6] See Carpenters (Mfg. Woodworkers Assn.), 326 NLRB 321, 325 (1998).

[7] There is no question as to the Employer's business being in the construction industry.

Section 6.1.5 of the MLA states that "[t]he Contractor agrees that neither he nor any of his subcontractors on the site will subcontract any work covered by this Agreement to be done at the site . . ." Thus, it applies only to work activity that will take place at the work site by workers at the work site. There is nothing in the language of the clause that creates any ambiguity as to its intent.[9] Therefore, when considering the facial validity of the clause based on its plain language, the clause contains the necessary jobsite requirements for protection by the construction proviso.

As to the Employer's assertion that Appendix D.3.4 expands the union signatory requirement to work done away from the job site, it does not change the fact that, on its face, the subcontracting clause unambiguously falls within the protection of the proviso. In any event, while Appendix D.3.4 states that it is amending all of Section 7 of the MLA,[10] it makes no mention of Section 6.1.5. The term "job site" that the Employer argues is expanded by Appendix D.3.4 is not the term "site" used in Section 6.1.5.

The Board recognizes that parties may apply a facially lawful clause in an unlawful manner, and considers extrinsic evidence to determine whether such a clause has been applied with an unlawful object.[11] However, evidence

---

8 Carpenters Local No. 944 (Woelke & Romero Framing, Inc.), 239 NLRB 241, 248 (1978), enfd. 654 F.2d 1301 (9th Cir. 1981), affd. in rel. part 456 U.S. 645 (1982). See also H. Rep. No. 1147, 86th Cong., 1st Sess., p. 39: "It should be particularly noted that the proviso relates only and exclusively to the contracting or subcontracting of work to be done at the site of the construction."

9 Compare Northeast Ohio District Council of Carpenters (Cedar Fair, L.P.), Cases 8-CB-9017 & 8-CE-80, Advice Memorandum dated April 11, 2000, where we found that the actual language in a subcontracting clause that applied to work that "historically had been performed on the job site" was ambiguous because it applied to both work done by the Signatory and by others at the jobsite and therefore required an examination of extrinsic evidence to determine the intent.

10 Section 7 of the MLA defines fabrication and installation work for purposes of setting detailed standards as to the types of materials and methods of fabrication that are covered by the agreement. It does not purport to define fabrication in terms of skills required, union status, etc.

of an unlawful application does not render maintenance of the clause itself unlawful, and the Board does not require the clause to be expunged but only that the parties cease enforcing it unlawfully.[12] Thus, given that the plain language of the clause addresses only "work site" activity, we find that the subcontracting clause is lawful on its face.

Accordingly, absent withdrawal, the Region should dismiss the Section 8(e) charge because we conclude that the self-help clause and the subcontractor clause of the MLA are facially lawful.

B.J.K.

---

11 Teamsters Local 982 (J.K. Barker Trucking Co.), 181 NLRB at 517.

12 See Carpenters Local 745 (SC Pacific), 312 NLRB 903, 914 (1993), enfd. mem. 73 F.3d 370 (9th Cir. 1995); Teamsters Local 610 (Kutis Funeral Home), 309 NLRB 1204, 1207-1208 (1992).